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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1158

KATHERINE C. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 81–86) is reported at 69 F. Supp. 447.[1] The opinion of the Circuit Court of Appeals (R. 93) is reported at 159 F. 2d 243.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 26, 1946 (R. 94). The petition for a writ of certiorari was filed on March 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

[1] The District Court's findings of fact and conclusions of law (R. 86–88) are not included in the opinion.

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the value of the trust created by the decedent in 1928 is includible in her gross estate under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after her death.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.* A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if
>
> (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).
>
> The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. * * *

STATEMENT

The following is a summary of the pertinent facts stipulated and found by the District Court (R. 86–87):

The Commissioner of Internal Revenue as-

sessed a deficiency in estate tax against the estate of Mary Clark de Brabant, hereinafter called the decedent, who died on December 19, 1939 (R. 35), on the theory that the value of a trust she had created during her lifetime was includible in her gross estate under Section 811 (c) of the Internal Revenue Code (R. 33–34). Petitioner—who is the daughter of the decedent, the residuary legatee and principal beneficiary under decedent's will, and who also was a beneficiary under the trust the decedent had created—paid the deficiency assessed against decedent's estate and instituted this proceeding in the District Court for refund of the tax (R. 33–34, 49, 81).

The trust involved was created by the decedent on February 6, 1928 (R. 34). In the trust instrument, the decedent directed that the trust income be paid to her during her lifetime, unless she directed otherwise (R. 11), and that (R. 11–12):

> (b) Upon the death of the Settlor, the trust shall cease and determine, and the entire principal, together with such income as may have accumulated since the payment of the last quarterly instalment shall be paid by the Trustee as follows:
>
> To the Settlor's daughter, Katherine C. Williams, if she be living at that time; or
>
> To the issue of said Katherine C. Williams, who may be living at the time of the Settlor's death, in case said Katherine C. Williams shall predecease the Settlor, or

> To the executor or executors of the Settlor, to be disposed of according to the Will of the Settlor, in case neither Katherine C. Williams nor any issue of hers be living as the time of the death of the Settlor.
>
> To Charles W. Clark, William A. Clark, Jr., and Katherine L. Morris, the brothers and one of the sisters of the Settlor, in case the Settlor dies without issue and without a valid will which shall be duly admitted to probate. Such brothers and sister shall take in equal shares, if they all three be living at the time of the death of the Settlor, but
>
> In case one or more of said brothers and sister of the Settlor shall have predeceased the Settlor, leaving issue, then the share that would have been paid to said brother or to said sister if living shall be paid to his or her issue.
>
> In case of payment to the issue of said Katherine C. Williams, such payment shall be made per stirpes and not per capita, the child or children of a deceased child of Katherine C. Williams taking the parent's share.

At the time the trust was created, Katherine C. Williams was 32 years of age and had two daughters who were then respectively nine and seven years of age. The decedent was then 58 years of age (R. 87). Both of petitioner's daughters, as well as petitioner, survived the decedent (R. 82).

Decedent's will stated simply that any property over which she had a power of appointment was to go to her daughter, Katherine C. Williams, absolutely and forever, and to her issue if she was not living at the time of the decedent's death (R. 56–57).

The transfer in trust was not made by decedent in contemplation of death (R. 87).

At the time of decedent's death the trust corpus had a value of $4,295,346.82 (R. 34).

On the basis of these facts, the District Court held that the value of the trust property at decedent's death is includible in her gross estate under Section 811 (c) of the Internal Revenue Code as a transfer in trust intended to take effect in possession or enjoyment at or after her death (R. 81–86). This holding was affirmed on appeal (R. 93).

ARGUMENT

Petitioner assumes that this case is governed by *May* v. *Heiner,* 281 U. S. 238, and other cases designated as the "*May* v. *Heiner* group" (Pet. 13) and argues at great length that this Court has not overruled that group of cases (Pet. 14–30). It seems unnecessary to discuss the cases to which petitioner refers, since the instant case, instead of being governed by the so-called "*May* v. *Heiner* group" of cases is practically identical to, and is obviously controlled by, this Court's decision in *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, which

also involved the retention of a contingent power of appointment and which, among other things, refutes petitioner's contention (Pet. 34–35) that the decedent's contingent power of appointment was too remote to support taxability under Section 811 (c) of the Internal Revenue Code, *supra*, p. 2. See also, *Commissioner* v. *Estate of Field*, 324 U. S. 113; *Goldstone* v. *United States*, 325 U. S. 687; *Eldredge* v. *Rothensies*, 150 F. 2d 23 (C. C. A. 3d). While the instant decedent, unlike the decedent in the *Fidelity Co.* case, *supra*, did not make an appointment in her will to take effect in the event her contingent power of appointment became exercisable, that fact, contrary to petitioner's suggestion (Pet. 34), does not immunize the decedent's transfer from tax. The decedent could have executed a new will and made the appointment at any time before her death. As this Court stated in the *Fidelity Co.* case, *supra*, p. 112, it is enough to support taxability under Section 811 (c) that the decedent retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries.

There quite plainly is no merit to petitioner's argument (Pet. 30–34) that, since the decedent did not make a contingent appointment in her will as to this trust property, she did not intend her transfer in trust to take effect in possession or

enjoyment at or after her death. The decedent did in fact, and therefore must have intended to, retain a contingent power of appointment conditioned on her survivorship of her daughter and her daughter's issue. It is the retention of that power, not whether decedent thought it would become exercisable, which suspended the ultimate disposition of the trust property until the decedent's death and made her transfer one intended to take effect in possession or enjoyment at or after her death within the meaning of Section 811 (c). See *Helvering* v. *Hallock,* 309 U. S. 106; *Fidelity Co.* v. *Rothensies, supra; Commissioner* v. *Estate of Field, supra; Goldstone* v. *United States, supra.*

The decision of the Tax Court in *Estate of Hughes* v. *Commissioner,* 7 T. C. 1348, to which petitioner refers as proof that confusion has attended the interpretation of this Court's decision in the *Fidelity Co.* case, *supra* (Pet. 6–7), involved a possibility of reversion by operation of law. The instant case, unlike the *Hughes* case, involves an expressly retained contingent power of appointment and is on all fours with the *Fidelity Co.* case. The question whether a possibility of reversion by operation of law supports taxability under Section 811 (c), involved in the *Hughes* case, is presented in *Estate of Spiegel* v. *Commissioner,* No. 1144, this Term, in which we are filing a memorandum not opposing certiorari

on that point. The Court below relied upon *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d), seemingly with reference to the problem of remoteness, in affirming the district court *per curiam.* That case, like the *Spiegel* case, involved a possibility of reversion by operation of law, and while it supports this judgment, *a fortiori,* this case does not raise that disputed issue.

CONCLUSION

The decision below is correct and involves no conflict of decisions nor question which requires settlement by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

APRIL, 1947.

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